In The

Supreme Court of the United States

October Term, 1978

No. 78-160

Roy Tibbals Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, Darrell L., Harold, Harold M. and Luea Sorenson,

Petitioners,

R. G. P. Incorporated, Otis Peterson, Travelers Insurance Company, State of Iowa and State Conservation Commission of the State of Iowa,

Respondents (Petitioners on separate petitions),

vs.

Omaha Indian Tribe and United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 11, 1978.

—o—

OPINIONS BELOW

The opinion of the Court of Appeals, ~~not yet~~ 575 F.2d 620 reported, appears as Appendix A hereto. The findings of fact and conclusions of law and the memorandum opinion of the District Court of the Northern District of Iowa are report-

ed, *United States v. Wilson*, 433 F. Supp. 57, 67. Copies appear as Appendixes B and C hereto.

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JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing with suggestion that rehearing be in banc, was filed on April 25, 1978 and denied on May 2, 1978. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

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QUESTIONS PRESENTED FOR REVIEW

Although 25 U. S. C. § 194 (set forth at p. 5 herein) is racially discriminatory on its face, it was applied by the Eighth Circuit to this case and its parties as justification for reversing a District Court judgment quieting title in Petitioners to 2900 acres of Iowa farm land on the east bank of the Missouri River, and to transfer said land to the United States as trustee and the Omaha Indian Tribe whose reservation lies on the opposite side of the River. The Tribe and the United States claim that the land is part of the Reservation transferred to the Iowa side of the River by avulsive actions. Petitioners, the record title holders, who, with their predecessors in title, had peaceful possession of the land for more than forty years (some of it for

eighty years) prior to its invasion by the Indians in 1975, claim the land as accretion to the Iowa riparian land or to the part of the bed of the River owned by the State of Iowa. The Eighth Circuit held that neither side proved accretion or avulsion; that § 194 put the burden of proof in the sense of the risk of non-persuasion on the Petitioners, and that therefore judgment had to be for Respondents (Tribe and U. S.).

§ 194, subject to certain conditions, puts the burden of proof on "the white person" in trials over property between "an Indian" and "a white person".

In spite of the fact that the Tribe as plaintiff has filed suit to obtain an additional 8,000 acres of Iowa farm land against numerous owners, and other Indian tribes are claiming millions of acres of land, in Maine, Massachusetts, and numerous other states, with respect to which § 194 will be as applicable as in this case, the Eighth Circuit disposed of the constitutional question in footnote 18 of its opinion (App. A20).

In spite of the numerous cases in this Court (cited in *Bakke*, infra p. 12) holding that a racial classification can be justified "only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available," the Eighth Circuit held § 194 constitutional without discovering any such purpose but only some vague "unique obligation toward the Indians" (App. A20).

In spite of this Court's decision in *United States v. Perryman*, 100 U. S. 235, 25 L. Ed. 645 (1880) that "white person" in §16 (App. E3) of the same 1834 statute in which § 194 was § 22, did not mean "not an Indian" and did not

include a Negro, the Eighth Circuit construed "a white person" to include all non-Indians (App. A25)—the State of Iowa, corporations, and individuals race and color not shown.

In spite of this Court's decision in *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 50 L. Ed. 2d 550 (1977) and other cases holding that the question of title of riparian owners is one of local law, the Eighth Circuit held that federal and not state common law of accretion and avulsion was applicable (App. A20).

In spite of *Louisiana v. Mississippi* et al., 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966) confirming "in all things" the Special Master's report holding that there can not be an avulsion within the bed of the stream, the Eighth Circuit held that Petitioners failed to sustain their burden of proof under § 194 because of the "possibility" that there was an avulsion within the bed of the stream (App. A27, 34).

In spite of *Nebraska v. Iowa*, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892), and a long line of cases which have followed it, holding that to constitute an avulsion there must be a severance of land from one bank of the river and its attachment to the other bank in such a manner that it can still be identified as the same land, the Eighth Circuit held that such identification was not necessary or important (App. A35, 39, 42).

Because of the foregoing facts and holdings of the Eighth Circuit, this Court should grant certiorari to enable it to decide the following questions:

1. Whether Title 25 U. S. Code § 194, putting the burden of proof on "the white person" in a suit by "an Indian", as construed and applied by the Eighth Circuit is unconstitutional because it is invidious racial discrimnaton and deprives Petitioners of their property and of the equal protection of the law in violation of the Due Process Clause of the Fifth Amendment.

2. Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.

3. Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.

4. Whether the Eighth Circuit erred in its determination of the governing principles of the federal common law of accretion and avulsion and its application of the law to the facts in this case.

5. Whether the Court of Appeals erred in holding that the District Court's determination that Petitioners had proved by a preponderance of the evidence that the land in question is accretion to the Iowa riparian land or to the State of Iowa's portion of the bed of the river, is clearly erroneous.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25

§ 194. *Trial of right of property; burden of proof*

In all trials about the right of property in which an Indian may be a party on one side, and a white

person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

Derivation. Act of June 30, 1834, C. 161, § 22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause.

No person shall . . . be deprived of life, liberty or property, without due process of law;

Other statutory provisions referred to herein as helpful in interpreting § 194 are included in Appendix E. They are the following:

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143.

An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, sections 12, 16 and 22, 4 Stat. 729, 730, 731, 733.

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STATEMENT OF THE CASE

The Petitioners[1] seek a review by this Court of the decision of the Eighth Circuit reversing a judgment in favor of Petitioners in the District Court for the Northern District of Iowa, which, pursuant to their counterclaims, quieted title in Petitioners as against the Omaha Indian Tribe and the United States as trustee for the Tribe, to 2900 acres of Iowa farm land lying on the east side of the Missouri River a few miles north of Onawa, Iowa. The District Court held that these Petitioners had proven by a preponderance of the evidence that the 2900 acres was accretion to Iowa riparian land or to that part of the bed of the river which was owned by the State of Iowa, and that the Tribe and the United States had failed to prove that said land had been severed from the Omaha Indian Reservation on the Nebraska side and came to exist on the east or Iowa side of the Missouri River thalweg by reason of any avulsion or avulsions. The Eighth Circuit decision is based on (1) its construction of Title 25 United States Code § 194 as being applicable to place the risk of nonpersuasion upon these Petitioners in this litigation, and its conclusion that said section is constitutional as so applied, and (2) its ideas of the law of accretion and avulsion which conflict with the principles announced in decisions of this Court, and which led it to the conclusion that the evidence failed to prove either avulsion or accretion. On that reasoning the Eighth Cir-

1 The word, "Petitioners," will be used to refer to the defendants, both those named as petitioners herein, and the other defendants who are filing separate petitions for certiorari.

cuit decision takes the 2900 acres away from Petitioners, who, with their predecessors in title have had possession of it for more than 40 years, some of it for as much as 80 years, and awards it to the United States as Trustee for the Omaha Tribe.

The complaint of the Omaha Tribe invoked the jurisdiction of the District Court under Title 28 United States Code §§ 1331 and 1362. The complaint of the United States as Trustee for that tribe invoked the jurisdiction of the District Court under Title 28 United States Code § 1345.

The 2900 acres is an area under the sky (of latitude and longitude) bounded on the west by the Iowa-Nebraska 1943 Compact boundary line, and on the north, east, and south by the Missouri River Nebraska shore meander line surveyed for the General Land Office in May of 1867 by Deputy Surveyor T. H. Barrett. It is sometimes referred to as the Barrett survey area. On the map, Appendix F, its boundaries are superimposed on a present day map showing the Blackbird Bend area (the area between the present river and the Iowa high bank) and showing the record ownership of that land. In 1867 this Barrett survey area was occupied by a peninsula or meander lobe pointing eastward like a thumb. The eastern two and one-half miles of it was about one and one-quarter miles wide from north to south and it became wider further west. The eastern one and one-half miles was described by Barrett as a "low sandy point" and "subject to frequent inundations, entirely worthless for cultivation."

By 1879 when the Missouri River Commission mapped the Missouri in this area, the eastern mile of the south side and two miles of the north side of Barrett's meander

lobe had disappeared, and the thalweg of the river was running through that area. Defendants' expert witnesses were all of opinion that the Blackbird Bend meander having reached its limiting width, its thalweg gradually moved west completely eroding away the low sandy point before it and throwing up sandbars behind it in the slack water.

The trial court having seen and heard the witnesses and having inspected the land in controversy, accepted the opinions of the Petitioners' experts. The Court of Appeals, however, said that the trial court's conclusion was clearly erroneous; that the evidence was speculative and conjectural, and that neither side proved either avulsion or accretion (App. A55).

In 1894 the area under the sky formerly occupied by the east end of the Barrett survey peninsula was surveyed as accretion land by the county surveyor of Monona County, Iowa and apportioned to the Iowa riparian owners accordingly. There is no record of any contemporary suggestion that there had been any avulsion in that area.

The second half of this case involves the southward migration of the meander point on the Iowa side immediately north of the Barrett survey peninsula and the disappearance of the rest of the Barrett survey area from the Nebraska side of the river between 1906 and 1927.

The Petitioners' experts were of opinion that between 1906 and 1923 the thalweg gradually eroded its way southward and the riverbed behind it became filled by deposition; that the land lying east and north of the 1923 river is all accretion land added by deposition to the Iowa high bank; that all of the land lying within the area formerly

occupied by the Barrett meander lobe is likewise accretion to the Iowa northern or eastern high bank. The trial court agreed.

As with the evidence with respect to the movement of the river between 1867 and 1879, the Eighth Circuit found the evidence with respect to the movement of the river between 1906 and 1923 to be speculative and conjectural (App. A62, 65), and accordingly that it was clearly erroneous for the District Court to decide the matter in favor of Petitioners because Petitioners had the risk of non-persuasion by reason of § 194[2].

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2 In the absence of § 194 the burden of persuasion would be on the respondents to prove avulsion. In *Mississippi v. Arkansas*, 415 U. S. 289, 39 L. Ed. 2d 333, 94 S. Ct. 1046 (1974), in his dissenting opinion Mr. Justice Douglas quoted from the special master's report (415 U. S. 295, 296, 29 L. Ed. 2d 338):

> The *burden of persuasion* was upon Arkansas. Initially Arkansas conceded that Mississippi (415 U. S. 2961) had met its initial burden, aided as it was by the presumption that the change in the thalweg of the river was the product of accretion. (Emphasis ours.)

The majority opinion states (415 U. S. 294, 39 L. Ed. 337):

> We agree with the Special Master's evaluation of the evidence and conclude, as he did, that Arkansas did not sustain its burden of rebutting Mississippi's conceded prima facie case, a burden the Arkansas court has described as "considerable." *Pannell v. Earls*, 252 Ark. 385, 388, 483 S. W. 2d 440, 442 (1972).

In the cited case the Supreme Court of Arkansas said:

> When land lines are altered by the movement of a stream, the weight of authority, both state and federal, appears to recognize a *strong presumption, founded on long experience and observation,* that the movement occurs by gradual erosion and accretion rather than avulsion. *United States Gypsum Co. v. Reynolds*, 196 Miss. 644, 18 So. 2d 448 (1944); *Dartmouth College v.*

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REASONS FOR GRANTING THE WRIT

1. Whether Title 25 U. S. Code § 194 as construed and applied by the Eighth Circuit in this case is an invidious racial discrimination against Petitioners and therefore denies them equal protection of the law and deprives them of property without due process in violation of the Due Process Clause of the Fifth Amendment, is an important question of federal law which has not been, but should be, settled by this Court.

The Eighth Circuit considered § 194 decisive of this case and would have rendered a decision favorable to petitioners had there been no § 194.

Other than the instant one we have found no case which has applied, construed or passed on the constitutionality of § 194.

In its complaint in this case the Omaha Tribe claims 11,000 acres of Iowa farmland[3]. The 2900 acres tried in this case was severed by the District Court from the Tribe's complaint and consolidated for trial with the suit brought by the United States as to the same 2900

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> *Rose*, 257 Iowa 533, 133 N. W. 2d 687 (1965); *Kitteridge v. Ritter*, 172 Iowa 55, 151 N. W. 1097; *Bone v. May*, 208 Iowa 1094, 225 N. W. 367. (Emphasis ours.)

Elsewhere called the "rule of the live thalweg" it requires clear and convincing" evidence of a cutoff to satisfy the burden of pursuasion of one claiming an avulsion. See p. 25 this petition. Special Master's Report, *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250.

3 A reasonable present valuation for this land would be about $1,000 per acre or $11,000,000.

acres. As to the remaining 8,000 acres trial awaits final decision of this case. The record owners and occupants of the 8,000 acres are very numerous and their separate tracts are comparatively small. The application of the Eighth Circuit's ruling with respect to § 194 is unclear as to many of those tracts.

Indian tribes are now asserting claims to immense areas of land in a large number of states and authoritative determination of the construction and constitutionality of § 194 is of great importance to the tribes, states and all others having any interest in land which is or may possibly be involved in claims of Indian tribes. These include owners, lessees, mortgagees, title insurers and former owners who have warranted title. Many of those Indian claims involve events occurring 100 or even 200 years ago. Defenses of adverse possession, statutes of limitation and estoppel by laches, may, as held by the District Court in this case, be unavailable as against a tribe or the United States. Witnesses are dead and important items of evidence may never be found. A determination as to who bears the risk of non-persuasion, may, as held by the Eighth Circuit in this case, be decisive.

The Eighth Circuit deals with the question of the constitutionality of § 194 in a single footnote (App. A20). It cites and quotes *Morton v. Mancari*, 417 U. S. 535, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974). That case involved a preference in employment in the Bureau of Indian Affairs given by statute to members of "federally recognized" Indian tribes. Footnote 42 at page 35 of the opinion of Powell, J. in the very recent case of *Regents of the University of California v. Bakke*, — U. S. — (No 76-811, 6/28/78), describes *Mancari* as follows:

> Petitioner also cites our decision in *Morton v. Mancari*, 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis*. *Id.*, at 554. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion." Ibid.

In *Mancari* this Court said (417 U. S. 554):

> Here, the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Unlike the *Mancari* preference, the § 194 discrimination is racial. It is not reasonably and directly related to a legitimate non-racially based goal, does not further the cause of Indian self-government or make the BIA more responsive, and it is clearly a proscribed form of racial discrimination[4]. "Preferring members of any one

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4 Other cases cited in the Eighth Circuit footnote include *Moe v. Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 483, 48 L. Ed. 2d 96, 112, 96 S. Ct. 1634 (1976), holding that immunity from state taxation of Indian tribes and their members living on Indian reservations did not constitute an invidious discrimination against non-Indians on the basis of race; and *Fisher v. District Court*, 424 U. S. 382, 390, 391, 47 L. Ed. 2d 106, 96 S. Ct. 943 (1976), holding that the tribal court, not Montana state courts, had jurisdiction of a

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group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." (Opinion of Powell, J. in *Bakke*, supra, p.37.)

That racial discrimination under a federal statute violates the Due Process Clause of the Fifth Amendment in like manner as a comparable state statute violates the Equal Protection Clause of the Fourteenth Amendment has been pointed out by this Court in a number of cases including *Bolling v. Sharp*, 347 U. S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954) (school segregation in the District of Columbia), *Weinberger v. Wiesenfeld*, 420 U. S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975) (gender discrimination in social security), *Hampton v. Mow Sun Wong*, 426 U. S. 88, 48 L. Ed. 2d 495, 96 S. Ct. 1895 (1976) (Civil Service employment discrimination against lawfully admitted resident aliens), and *Washington v. Davis*, 426 U. S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597, 607 (1976) (question of racial discrimination in employment of policemen in District of Columbia). In *Bakke, supra*, (opinion of Brennan, White, Marshall and Blackmun, J. J., at page 43) it is stated:

> To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment[5].

The several opinions in *Bakke* had much to say with respect to the rules for determining when state or federal governmental discrimination is invidious and unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment. The following are a few excerpts:

> Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. (Powell, J., p. 21).
>
> • • •
>
> Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, ... When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. (Powell, J., p. 30).
>
> • • •
>
> We have held that in "order to justify the use of a suspect classification, a State must show that

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proceeding for the adoption of one tribal member by other tribal members. The Court said (424 U. S. 390, 391):

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law . . . disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

The other cases in the Eighth Circuit footnote also uphold jurisdiction of Indian courts over reservation Indians and transactions on reservations, exemption of reservation Indians from state taxes, and Congressional determination of eligibility for tribal membership and ensuing rights. Those preferences were considered reasonable and rationally designed to further Indian self-government.

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5 The Commerce Clause—United States Constitution, Article I, Section 8, "the Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplshment' of its purpose or the safeguarding of its interest." (Powell, J., p. 36).

* * *

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. (Brennan, White, Marshall, Blackmun, J. J., p. 33).

* * *

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such classification an important and articulated purpose for its use must be shown. (Brennan, White, Marshall, Blackmun, J. J., p. 37).

* * *

It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. (Powell, J., p. 25).

The Eighth Circuit did not subject § 194 to strict scrutiny. It simply assumed that any legislation giving Indians special beneficial treatment was valid regardless of the effect such special treatment might have on the rights of other persons.

The Eighth Circuit did not find any compelling governmental purpose to support § 194. And since it found no such purpose it did not consider whether there was a less restrictive alternative for achieving such purpose.

The Eighth Circuit merely quoted *Mancari* to the effect that special treatment of Indians is permissible as long as it can be tied rationally to the fulfillment of Congress' unique obligation to the Indians. But the Eighth Circuit made no attempt to consider or point out how § 194 can be tied rationally to the fulfillment of any such vague obligation.

In the case of § 194 there is no overriding national interest justifying the patent discrimination between "the Indian" (tribe) and the "white person" (non-Indian) pursuant to which the Eighth Circuit relieves the Tribe and the United States as trustee for the Tribe of the burden of proof they would normally have as plaintiffs in a suit to quiet title; and which they would have by reason of the "rule of the live thalweg", that the boundary follows the changes in the navigable channel unless there has been clear and convincing proof of avulsion, that is, of a cutoff in which the river left its old bed and formed a new one. See p. 26 of this petition.

The discriminaion on the basis of duration of residence, of citizenship, of gender and of race in the cases in which this Court found invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment or of the Due Process Clause of the Fifth Amendment are comparable to the invidious discrimination by reason of race provided by § 194, which likewise should be declared unconstitutional. If "a white

person" means a Caucasian (as we shall soon point out) rather than a non-Indian, then the discrimination is even more invidious, for the white person is singled out for invidious treatment not in a comparable situation imposed upon black, yellow, brown, or red people or upon corporations or units of government.

2. This Court should grant the writ of certiorari to enable this Court to correct the erroneous construction of Title 25 U. S. Code § 194 by the Eighth Circuit, an important question of federal law which has not been but should be settled by this Court.

(a) The Eighth Circuit erred in holding that the words "an Indian" in § 194 include an Indian tribe and the United States as Trustee for a tribe.

That the statute applies only where an individual Indian is a party seems too clear to require help from legislative history. Nevertheless we will invite attention to such legislative history as we have been able to discover. The pertinent sections of the statute are listed herein at page 5, and reproduced in Appendix E. Note that the ancestor of § 194 first appeared in the 1822 Act as § 4 (App. E2) and used the plural "Indians"—"in which Indians shall be a party on one side and white persons on the other." This was changed to the singular in the 1834 Act (§ 22, App. E3, 4)—"an Indian . . . a white person." The change from plural to singular made it clear that individuals—not groups—were contemplated.

A reason for the change from plural to singular appears to be the change in § 12 of the "Act to regulate

trade and intercourse with the Indian tribes" etc. In its 1802 form (App. E2) it made invalid any conveyance of land "from any *Indian, or* nation or tribe of Indians" unless made by treaty or convention. (Emphasis ours.) The 1834 revision eliminated "Indian, or" from § 12 (App. E3). Thus the 1834 changes made it clear that the protection of § 12 applied only to Indian tribes and nations, not to individual Indians, and protection of § 22 (§ 194) applied only to individual Indians, not to nations and tribes, thus eliminating duplication of such protective measures.

(b) The Eighth Circuit erred in holding that the words "a white person" in § 194 means all non-Indians—states, corporations and individuals whose race or color is not shown (App. A25).

The sovereign State of Iowa is not a white person. It is not even a person. In *United States v. United Mine Workers of America,* 330 U. S. 258, 275, 91 L. Ed. 884, 67 S. Ct. 677 (1947) the Court said:

> The Act does not define "persons". The common usage of that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provision, Rev. State. § 1, 1 USCA § 1, 2 FCA title 1, § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.

R. G. P., Inc. and Travelers Insurance Company are corporations and as such they may be persons but they are not white persons. White persons have to be flesh

and blood people—human beings. The individual petitioners could be white persons. But the tribe and the United States apparently did not think enough of their § 194 argument to take the trouble to prove that any of the individual petitioners were white. The Eighth Circuit construes "a white person" to mean a non-Indian (App. A25). The same contention that the statutory language "a white person" should be construed to mean a non-Indian was made with respect to § 16 (App. E3) of the same 1834 Act of which § 194 was § 22. § 16 provided that when a white person was convicted of a crime committed in Indian country in which the property of a friendly Indian was taken or destroyed, the person so convicted should be sentenced to pay the friendly Indian double the value of the property, and if the offender was unable to pay at least the value, the government should pay the amount by which the offender's payment fell short. In *United States v. Perryman,* 100 U. S. 235, 25 L. Ed. 645 (1880), suit was brought by a friendly Indian against the United States for the value of 23 head of beef cattle stolen from him by a Negro who was duly convicted of the theft. This Court held that the United States was not liable. The Court said:

> It is contended, however, that the term "white person", as here used, means no more than "not an Indian"; in other words, that the intention of Congress was to make the United States liable in the way indicated for all injuries to the property of friendly Indians by persons engaged in crime within the Indian Territory who were not themselves Indians. Such, we think, is not the true construction of the statute.

The Court pointed out that the words "a white person" were substituted for "any such citizen or other person"

used in previous statutes (§ 4, Act of 1802, App. E1) and that if Congress had wanted liability of the United States to arise by reason of theft by Negroes it could have continued to use that former language. Likewise with respect to § 22 (§ 194). If Congress had meant non-Indians it could have said so, or used the language of the former statutes referred to above. Congress used the same words "a white person" in both § 16 and 22. It is highly improbable that the same words would have different meanings in the two sections of the same statute.

(c) The Eighth Circuit erred in holding that the words "previous possession or ownership" in § 194 includes possession or ownership of land or shore in the same area under the sky, i. e. same latitude and longitude, as the land in controversy regardless of whether or not the land or shore previously possessed on the west side of the river had been completely eroded away and replaced by new accretion land on the east side of the river.

The trial court held (page 20 of District Court opinion) that § 194 was not applicable to this case because by its terms to make it applicable "the Indian" must first "make out a presumption of title in himself from the fact of previous ownership"; that to do that "the Indian" would have to show that the land on the Iowa side of the river now claimed by "the Indian" is the same land he owned on the Nebraska side in 1867, not new land added by accretion to the Iowa riparian land, and that if "the Indian" could prove that, he would not need § 194 because he would have proved his case without its help. The Eighth Circuit (opinion page 22) rejected that reas-

oning. It seems to hold that even if the 1867 land has been eroded away and replaced in the same area under the sky by accretion, it is the same land with a mere change of title. Here the Court of Appeals for the Eighth Circuit takes a position in direct conflict with the Court of Appeals for the Ninth Circuit which said in *Beaver v. United States,* 350 F. 2d 4 (C. A. 9, 1965):

> The tract in question is in the same physical location as land patented to appellant's predecessor in title in 1914, and, at that time, located in Arizona. * * * If accreted land, it is *not* the land originally patented by the United States in 1914. * * * Appellants equate the precise land lost by erosion from the land on the Arizona side of the river with the precise land gained by accretion on the California side. There is not "physical identity" between the two areas of land, even though each is described as within the same Section 4, Township 9 South, Range 22 East, San Bernardino Meridian.

The Eighth Circuit says that the District Court presumes "that the reservation land has in fact been destroyed." Actually the Eighth Circuit presumed that it has not been destroyed, a presumption which is contrary to other presumptions or strong inferences favoring Petitioners including the presumption of ownership which follows record title; the presumption of ownership from possession (petitioners' peaceful possession for more than 40 years was conceded); the presumption that the land being on the east side of the Missouri River (before the 1943 Boundary Compact) was in Iowa; the presumption that public officers have properly discharged their duties (BIA reported no avulsions and claimed none from 1867 to 1975); and the strong presumption that a movement of a river has been by erosion and accretion rather than by avulsion; and to the rule of the live thalweg. Based

on its presumption of identity the Eighth Circuit finds the § 194 "fact of previous possession or ownership" from which it makes out a "presumption of title" in "the Indian." Thus the Eighth Circuit puts the burden of proof "upon the white person."

3. This Court should grant the writ of certiorari to enable this Court to correct the erroneous holding of the Eighth Circuit that federal, not state, common law of accretion and avulsion is applicable in this case, a federal question decided in a way in conflict with applicable decisions of this Court.

Petitioners submit that state law of accretion and avulsion is applicable, *Oregon v. Corvallis Sand & Gravel Company,* 429 U. S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977). And see District Court opinion, App. C 5-8. No state boundary is here in question since it was fixed by the Iowa-Nebraska Boundary Compact of 1943. There is here no showing of significant conflict between federal policy and state law to justify application of federal law. *Wallis v. Pan American Petroleum Corp.,* 384 U. S. 63, 16 L. Ed. 339, 86 S. Ct. 1301 (1966). Since the land is in Iowa, Iowa law should be applied. The law applied by the Eighth Circuit under the guise of federal common law was clearly contrary to the applicable state law.

It has long, and traditionally, been the rule announced by the United States Supreme Court that "the question of title of a riparian owner is one of local law." *Whitaker v. McBride,* 197 U. S. 510 at 512, 49 L. Ed. 857, 860, 25 S. Ct. 530 (1905). See also, *Shively v. Bowlby,* 152 U. S. 1, 45, 38 L. Ed. 331, 348, 14 S. Ct. 548 (1894); and *Corvallis,* supra, 429 U. S. 363, 379, 50 L. Ed. 2d 550,

97 S. Ct. 582 (1977) which emphasizes that "even when federal common law was in its heyday under the teachings of *Swift v. Tyson,* 16 Pet. 1 (1842), an exception was carved out for the local law of real property." See also *Barney v. Keokuk,* 94 U. S. 324, 24 L. Ed. 224 (1876). In view of the Eighth Circuit's significant departure from state law, it is important that this court resolve this issue. Application of state law would avoid the legal confusion sure to result if federal law and state law is permitted to reign in the same locality, and indeed on the same river; simply because a federal interest is asserted by the United States.[6]

4. This Court should grant the writ of certiorari to enable this Court to correct the erroneous determination of the Eighth Circuit of the governing principles of federal common law of accretion and avulsion, decided in a way in conflict with applicable decisions of this Court.

(a) The Eighth Circuit erred in holding that an avulsion may take place within the bed of the stream.

The bed of the stream includes the area between its banks below ordinary high water mark. *United States v. Chicago & St. P. & P. R. Company,* 312 U. S. 592, 61 S. Ct. 772, 85 L. Ed. 1064, 1070 (1941). The shore is the area between ordinary high water mark and low water.

6 See, e. g., this court's recent decision in *California v. U. S.,* 46 LW 4997 (July 3, 1978), which invoked the state's right to impose conditions on the appropriation of water for federal use. This court recognized the "continued deference to state water law by Congress" [at p. 4999] and recognized the federal policy was to avoid "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." [at p. 5003]

Alabama v. Georgia, 64 U. S. (23 Howard) 505, 515, 16 L. Ed. 556 (1859). See also *Words and Phrases* under "Bed". The shores are part of the bed. Sandbars are parts of the bed of the stream. Since Barrett's low sandy point was without vegetation, frequently inundated and worthless for agriculture, it was clearly shore, part of the bed of the river. The Eighth Circuit (App. A44) states:

> The record also supports the *possibility* that bar C [on the 1879 map] located on the eastern end of the lobe, was the same surface area described by Barrett in his notes and was not built up by accretive deposits. The record is insufficient to prove what actually occurred. (Emphasis ours.)

Upon that "possibility" the Eighth Circuit based its theory that there could have been an avulsion "within the bed of the river" between 1867 and 1879, a cutting off of a small piece of shore from the tip of the Barrett low sandy point. Again (App. A27, 34) the Eighth Circuit says that the southward movement of the river between 1912 and 1923 [better described we think as 1906 to 1927] was through "alluvion soil subject to frequent inundation" deposited after 1890, which the Court says "would not reveal any conspicuous identifiable features" (App. A63, 64). Here again the movement of the river was through the shore and sandbars, within the bed of the stream. Because the Eighth Circuit thought that Petitioners had failed to prove that there was no "possibility" that some shoreland or sandbar had not been completely eroded away as the thalweg crossed from the east to the west of it, that Court concluded that Petitioners had not sustained the burden of proof which that Court placed upon them by reason of its conclusions with regard to § 194.

The Eighth Circuit's conclusion that there could be an avulsion within the bed of the stream is diametrically opposed to the conclusion of the Special Master of this Court in the case of *State of Louisiana, Plaintiff v. State of Mississippi, et al.*, No. 14 original, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966). This Court "in all things confirmed" the Special Master's Report. The suit involved ownership of an oil well and the right to oil produced from it, the bottom hole of which was under the bed of the Mississippi River and which was on the west or Louisiana side of the thalweg when it first became a producer. Shortly thereafter the thalweg moved across the well location. Louisiana claimed the boundary had become fixed before the well was drilled because of an avulsion in 1950-52 within the bed of the river. The Special Master found in favor of Mississippi. The Special Master asked (page 17 of his report):

> Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?

He answered the question in the negative. He said:

> The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the "live thalweg" is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible. . . . we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases the new channel was formed when the river "suddenly leaves its old bed and forms a new one * * *." *Arkansas v. Tennessee*, 246 U. S. 158, 173.

(b) The Eighth Circuit erred in holding that the absence of identifiable land in place, that is, land which can be identified as having been severed from the opposite bank of the river, has little probative value on the issue of accretion vs. avulsion (App. A35, 63).

The Eighth Circuit in its opinion (App. A30) cites *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892), and other Supreme Court cases which point out that the identity of the land involved, not the rapidity of the erosion and deposition, is the essential factor to make a change of channel an avulsion. It even quotes Vattel (App. A30) as quoted in *Nebraska v. Iowa*, pointing out that the transfer to be an avulsion must be "in such manner that it can still be identified." This has become textbook law. In 93 C. J. S. 750, 751 Waters, Section 76, the rule is laid down thus:

> In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvion, it is accretion, but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion.

The Eighth Circuit also cites many Nebraska cases to the same effect and we can cite many Iowa cases holding to the same rule. We will cite *Banks v. Chicago Mill & Lumber Co.*, 92 F. Supp. 232 (U. S. D. C. E. D. Ark. 1950) for its good collection of pertinent excerpts from other opinions on the point.

But then the Eighth Circuit proceeds to reject *Nebraska v. Iowa*, and the cases that have followed it, and says that identification of the land in question is not important. Then its opinion proceeds to say (App. A38):

> In the present case the plaintiffs claim that a sudden and unusual jump in the thalweg *within the bed of a stream* or over, as well as around, land (*submerged or not*) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. (Emphasis ours.)

The Eighth Circuit said that the District Court holding was in error. The District Court was following *Nebraska v. Iowa* and the long line of cases which have followed it.[7] We submit that *Nebraska v. Iowa* and the

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7 *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) continues to be cited as accepted law by this Court as well as by other federal and state courts, e. g., *Oklahoma v. Texas*, 260 U. S. 606, 637, 67 L. Ed. 428, 435, 43 S. Ct. 221 (1922); *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966), Special Master's Report pp. 14, 15, 16; *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 326, 38 L. Ed. 2d 526, 539, 94 S. Ct. 517 (1973) (Overruled on other grounds, *Oregon v. Corvallis*, infra); *Mississippi v. Arkansas*, 415 U. S. 289, 291, 39 L. Ed. 2d 333, 339, 94 S. Ct. 1046 (1974); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 375, 50 L. Ed. 2d 550, 561, 97 S. Ct. 502 (1977).

District Court decision are sound and correct, and that it is the Eighth Circuit that is in error.

5. This Court should grant the writ of certiorari to enable this Court to correct the erroneous holding of the Eighth Circuit that the District Court's determination that Petitioners had proven by a preponderance of the evidence that the land in question is accretion to Iowa riparian land or to the State of Iowa's portion of the bed of the river, is clearly erroneous.

The Eighth Circuit's holding that the District Court's judgment is clearly erroneous is based largely on the Court of Appeals' misunderstanding of the federal common law of accretion and avulsion. But even if the law were as the Eighth Circuit deemed it to be, and sandbars and shore were to be treated as high and dry fast land, the great weight of the evidence is that the land, shore and bars in question on the Nebraska side of the thalweg were completely eroded away and the land now occupying the same space under the sky on the Iowa side came there by the process of deposition of alluvium—accretion to the left bank of the river and to the Iowa owned part of the bed of the river. We shall not elaborate upon this point in this petition. The evidence is reviewed in the findings of the District Court, Appendix B.

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CONCLUSION

Because of the importance to numerous land owners, states, title insurers, mortgagees, and the Indian tribes and the United States Government of having an authoritative and correct determination of the construction, applicability and constitutionality of Title 25 U. S. Code § 194, and an authoritative and correct determination of the federal common law of accretion and avulsion and the appropriateness of its application to this land and to the additional 8,000 acres also claimed by the Omaha Tribe in the part of this litigation remaining to be tried, as well as to cases elsewhere, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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